STATE OF MICHIGAN

COURT OF APPEALS

KEVIN L. THOMPSON, Plaintiff-Appellant,	UNPUBLISHED December 10, 2015
v	No. 323476 Michigan Compensation Appellate Commission
GENERAL MOTORS CORPORATION, Defendant-Appellee.	LC No. 13-000038

KEVIN L. THOMPSON, Plaintiff-Appellee,	
v	No. 323489 Michigan Compensation Appellate Commission
GENERAL MOTORS CORPORATION, Defendant-Appellant.	LC No. 13-000038

Before: SAAD, P.J., and STEPHENS and O'BRIEN, JJ.

PER CURIAM.

In this workers' compensation case, both plaintiff and defendant appeal from the order of the Michigan Compensation Appellate Commission ("MCAC") that affirmed the opinion/order of the magistrate, which awarded benefits. In Docket No. 323476, plaintiff is the appellant, while in Docket No. 323489, defendant is the appellant. For the reasons provided below, we affirm.

Plaintiff started working for General Motors (GM) at its Delphi East plant in Flint as a parts handler/assembler in 2007. After a year or so, he transferred to GM's Service Parts Operations (SPO) facility in Burton, Michigan. At SPO, he drove stand-up hi-lo vehicles, which required him to drive backwards while carrying loads, often under "bumpy" surfaces. In order to see where he would be driving in these instances, plaintiff had to keep his neck twisted and turned facing rearward. During his employment, he felt pain in his neck and back, which he

attributed to driving the hi-lo. In May 2009, the pain was so severe that he left work. Subsequent testing revealed, among other things, a herniated disc at the C4-C5 vertebrae. On September 1, 2009, he underwent neck/spinal surgery, which consisted of a laminectomy discectomy fusion.

Plaintiff sought workers' compensation benefits. The Michigan Compensation Appellate Commission (MCAC) affirmed the magistrate's grant of wage-loss benefits for a closed period.

I. STANDARDS OF REVIEW

"Our review begins with the [MCAC's] decision, not the magistrate's. *Moore v Prestige Painting*, 277 Mich App 437, 447; 745 NW2d 816 (2007). While the [MCAC] reviews the magistrate's decision under the "substantial evidence" standard, this Court reviews the [MCAC's] findings of fact under the "any evidence" standard. *Omian v Chrysler Group, LLC*, 309 Mich App 297, 306; 869 NW2d 625 (2015). In other words, the MCAC's findings "are conclusive on appeal, absent fraud, if there is any competent evidence in the record to support them." *Moore*, 277 Mich App at 447 (quotation marks omitted). But any questions of law involved in any MCAC order are reviewed de novo. *Omian*, 309 Mich App at 306.

II. DOCKET NO. 323476

A.

Plaintiff argues that the magistrate erred in making this a closed award based on a determination that plaintiff could return to one of his past jobs at GM. However, as already discussed, our focus is on whether the MCAC erred, not the magistrate. *Moore*, 277 Mich App at 447.

Plaintiff claims that the testimony from Dr. Kelvin Callaway and Dr. Clifford Buchman compel the conclusion that plaintiff is totally and permanently disabled. Dr. Callaway, who is plaintiff's primary physician, initially testified that plaintiff was "totally and permanently disabled." However, the MCAC did not accept this testimony at face value because Dr. Callaway explained that plaintiff, indeed, could perform work with the restriction that there be no repetitive turning and twisting of the head and neck. Dr. Buchman, an orthopedic specialist, testified that plaintiff was not capable of working. The MCAC recognized this but chose to not accept Dr. Buchman's views because they were based on several inaccurate factors. The MCAC noted that

> [Dr. Buchman] felt vertigo was the result of surgery—but the records of the company clinic and Dr. Jackson clearly indicate complaints of feeling faint or dizzy well before the surgery. Dr. Buchman noted the "failure" of the surgical implants. In reality, there is only evidence that some of the fixative screws *may* have loosened after plaintiff's fall in March 2010. This is hardly a failure of the hardware and was not linked to any specific increase in symptoms. He concluded plaintiff's depression would also prevent a full return to work. Besides being outside the scope of his expertise, Dr. Buchman's opinion is at odds with both Dr. Nagarkar and Dr. Freedman, who felt a return to work would be therapeutic for the depression. Finally, Dr. Buchman opined plaintiff could not drive. Dr.

> Callaway released plaintiff to drive and as plaintiff has engaged in various social activities such as dating, it appears he is driving as necessary.

All of the MCAC's findings here are supported by the record. As such, it was within the province of the MCAC and the magistrate to weigh the opinion evidence of Dr. Buchman, and they were not obligated to accept his testimony as dispositive. See *Miklik v Mich Special Machine Co*, 415 Mich 364, 367; 329 NW2d 713 (1982) (stating that factfinder in a workers' compensation case is free to accept the most persuasive medical testimony); *Fergus v Chrysler Corp*, 67 Mich App 106, 112; 240 NW2d 286 (1976) (stating that the factfinder has wide discretion is ascribing the weight and credibility to the testimony presented). Moreover, plaintiff claims that Dr. Buchman's work restriction was not based on vertigo, but Dr. Buchman stated, "He can't work while he's dizzy, and he really can't do much of anything with the neck pain that he's got. So I would restrict him from lifting more than five pounds. I would restrict him to not use his hands repetitively; *but because of the dizziness, he can't go back to work*." [Emphasis added.] Accordingly, the MCAC's finding that plaintiff could return to work, albeit with some restrictions, is supported by the record.

B.

Plaintiff argues that the MCAC erred in finding that plaintiff's depression was not related to work. This argument, though, conflates what the magistrate (and hence the MCAC) actually found. The MCAC adopted the following from the magistrate:

> Plaintiff alleged and offered evidence to the effect that he is depressed and not able to work. This was supported almost exclusively by the testimony of Elonzo Duncan, the social worker. I decline to accept this position. Plaintiff obviously is capable of handling his daily routine, interacting with others appropriately, maintaining his appearance and hygiene, and thinking in a logical and coherent manner. Mr. Duncan's opinion is unsupported. This is especially true with his unique diagnosis of post-traumatic stress disorder, causing too much anxiety for plaintiff to work. This is entirely unsupported by any other evidence.
>
> In contrast, Dr. [Sachin] Nagarkar and Dr. [Michael] Freedman both found plaintiff capable of dating and interacting normally, and noted he might be psychologically improved with a return to work if his physical condition allowed it. I find no psychological disability. In fact, I do not find any depressive symptoms requiring treatment to be related to work.

The focus of the finding was that from a psychological standpoint, nothing prevented plaintiff from working.

As previously discussed, the factfinder is free to accept or reject any medical testimony as it sees fit. See *Miklik*, 415 Mich at 367; *Fergus*, 67 Mich App at 112. Thus, the MCAC was free to expressly not accept the position of Duncan. Regarding the finding that both Dr. Nagarkar and Dr. Freedman thought that it would be beneficial for plaintiff to return to work, this is supported by the record. Dr. Nagarkar, a psychiatrist, agreed that "from a purely mental health standpoint, a return to work would be therapeutic." Dr. Nagarkar further acknowledged

that it would only be from a physical standpoint that would keep plaintiff from being able to work. Likewise, Dr. Freedman testified that plaintiff was not disabled from a psychiatric standpoint and a return to work would, in fact, be positive for him. As a result, we find that there is evidence in the record to support the MCAC's determination that from a psychological standpoint, nothing prevented him from working. We further note that whether any existing psychological symptoms were related to the work-related pain misses the point because any such symptoms do not preclude him from working.

C.

Plaintiff claims that the MCAC erred in adopting the finding of the magistrate that plaintiff failed to meet the requirements of *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). Our Supreme Court in *Stokes* stated that in order for a claimant to establish a disability, he "must prove a work-related injury *and* that such injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training." *Id.* at 297. In order to establish this latter element, a claimant must do the following:

> (1) The claimant must disclose all of his qualifications and training;
>
> (2) the claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate;
>
> (3) the claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and
>
> (4) if the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs. [*Id.* at 297-298.]

With respect to the second requirement, the Court stated:

> The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past. The claimant is not required to hire an expert or present a formal report. For example, the claimant's analysis may simply consist of a statement of his educational attainments, and skills acquired throughout his life, work experience, and training; the job listings for which the claimant could realistically apply given his qualifications and training; and the results of any efforts to secure employment. The claimant could also consult with a job-placement agency or career counselor to consider the full range of available employment options. Again, there are no absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits. A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages. [*Id.* at 282.]

Plaintiff presented the testimony of Michele Robb, a vocational rehabilitation consultant, who in essence did a *Stokes* analysis. Robb prepared a report looking at plaintiff's vocational history, restrictions imposed by doctors, transferable skills (she found none), and the jobs he could perform, and did a search concluding that there were no jobs within a relevant radius of his home that he could perform.

The MCAC thereafter adopted the magistrate's finding that

> plaintiff's vocational expert did not use functional restrictions that are consistent with my findings of the appropriate restrictions, if any. As a result, plaintiff failed to meet the *Stokes* requirement of demonstrating no work available that pays his maximum wage earning capacity, as of the date of his release to driving. His entitlement to wage loss benefits would end as of that date.

We agree with plaintiff that it appears that this finding is not entirely supported by the record. The magistrate found that the only restriction applicable once plaintiff was released to drive in May 2010 was that "plaintiff cannot repetitively twist or turn his neck, or turn it to any extreme." Robb attempted to provide a maximum wage earning potential for each of the sets of restrictions she was provided by Dr. Mayer, Dr. Callaway, and Dr. Buchman. Importantly, for her analysis using Dr. Callaway's restriction, the restriction consisted of "avoid[ing] any activity or job which requires frequent repetitive head movement/neck twisting." With Dr. Callaway's restriction being, for all intents and purposes, the same as the restriction enunciated by the magistrate, it is clear that the magistrate erred when it stated that Robb did not use consistent restrictions.[1]

However, this one factual error is not dispositive. The magistrate went on to find that he saw no reason why plaintiff could not return to work as an assembler, which was his first job with GM. This is the salient finding, and there is nothing in the record to disturb it. Plaintiff's description of his duties as a parts handler/assembler did not involve repetitive turning or twisting of the neck. Furthermore, plaintiff never provided explicit testimony regarding how much he was paid while working this first job at GM. As the magistrate noted, "[t]here is no indication one or the other of these [two] jobs [at GM] paid greater wages on average." Therefore, because the record supports the finding that plaintiff could have returned to work as a parts handler/assembler and because plaintiff did not show that the wage of a parts handler is less than what he was making as a hi-lo driver, the ultimate finding that plaintiff failed to meet his *Stokes* burden was accurate, and his claim of error fails. See *Stokes*, 481 Mich at 283 ("The finder of fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden.").

III. DOCKET NO. 323489

[1] We note that the restrictions provided by Dr. Buchman were severe and inconsistent with the magistrate's ultimate finding, but that does not change the fact that Robb provided three separate analyses using the reports from the doctors, and the one involving Dr. Callaway's restriction was consistent with the magistrate's finding.

A.

Defendant argues that the MCAC erred in adopting the magistrate's finding on remand that plaintiff had suffered a work-related injury that was medically distinguishable from a pre-existing condition. Defendant points out that in his original opinion, the magistrate noted that plaintiff had a pre-existing degenerative condition; defendant asserts that the magistrate relied on inference to conclude that a work trauma caused further disc bulging, that there was no clear evidence of distinct pathology or a specific trauma, that the magistrate impermissibly focused on symptoms, and that the magistrate flipped a coin to decide the cause was work-related as opposed to the progression of a preexisting condition.

MCL 418.301(2) provides, in relevant part:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, are compensable if contributed to or aggravated or accelerated by the employment in a significant manner.

In *Rakestraw v Gen Dynamics Land Sys*, 469 Mich 220, 230-232; 666 NW2d 199 (2003) (footnotes and some emphases omitted), the Court held:

> [A]n employee must establish the existence of a work-related injury by a preponderance of the evidence in order to establish entitlement to benefits under [MCL 418.301(1)]. A symptom such as pain is evidence of injury, but does not, standing alone, conclusively establish the statutorily required causal connection to the workplace. In other words, evidence of a symptom is insufficient to establish a personal injury "arising out of and in the course of employment."
>
> The text of the statute does not specifically demand that a claimant prove that his injury is "medically distinguishable" from a preexisting condition. However, the clear language of the statute *does* require the establishment of "a personal injury arising out of and in the course of employment." Where a claimant experiences symptoms that are consistent with the progression of a preexisting condition, the burden rests on the claimant to differentiate between the preexisting condition, which is *not* compensable, and the work-related injury, which *is* compensable. Where evidence of a medically distinguishable injury is offered, the differentiation is easily made and causation is established. However, where the symptoms complained of are equally attributable to the progression of a preexisting condition or a work-related injury, a plaintiff will fail to meet his burden of proving by a preponderance of the evidence that the injury arose "out of and in the course of employment"; stated otherwise, plaintiff will have failed to establish causation. Therefore, as a practical consideration, a claimant must prove that the injury claimed is distinct from the preexisting condition in order to establish "a personal injury arising out of and in the course of employment" under [MCL 418.301(1)].

In Fahr v Gen Motors Corp, 478 Mich 922 (2007), the Court explained that in order

> to demonstrate a medically distinguishable change in an underlying condition, a claimant must show that the pathology of that condition has changed. Although a medical expert need not use the phrase "change in pathology," there must be record evidence from which a legitimate inference may be drawn that the plaintiff's underlying condition has pathologically changed as a result of a work event or work activity in order to meet the legal test for a personal injury under MCL 418.301(1) and *Rakestraw*.

Defendant claims that plaintiff "has only offered medical testimony of *symptoms*." [Emphasis added.] If true, this would indeed be problematic for plaintiff, as there must be an associated change in pathology in order to constitute a disability. *Id.* But, here, there was more than just a report of symptoms—there was evidence of a change in pathology. Plaintiff's MRI revealed that he suffered a herniated disc at C4-C5. There was no evidence that this herniated disc existed prior to plaintiff's employment as a hi-lo driver. Therefore, defendant's argument is misplaced.

Defendant also argues that the magistrate was required to use the "significant manner standard" set forth in *Farrington v Total Petroleum, Inc*, 442 Mich 201, 216-217; 501 NW2d 76 (1993). The *Farrington* Court stated that a plaintiff must show that his injury was "significantly caused or aggravated by employment considering the totality of all the occupational factors and the claimant's health circumstances and nonoccupational factors." *Id.*

The MCAC held that the magistrate properly balanced the work-related factors with the non-work-related factors to assess relative effect and that there was sufficient evidence in the record, as detailed in the magistrate's findings, to support the magistrate's finding on remand. Again, this determination must be upheld if there is any competent evidence in the record to support it. *Moore*, 277 Mich App at 447.

The magistrate pointed out that the evidence supported one occupational factor, the driving of the hi-lo with twisting, and one questionable nonoccupational factor, piano playing. With regard to plaintiff's pre-existing bone spurs, the magistrate determined that they were not a factor in the disability. The magistrate further stated:

> Dr. Callaway and Dr. Buchman concluded the work activity of hi-lo driving with the neck turned caused or significantly aggravated the disc pathology. Neither testified that the piano/organ playing contributed to the pathology. Neither felt there was pre-existing pathology that caused disability. . . .
>
> [A]ssuming *arguendo* that there was disc bulging prior to the work activity, there was no complaint of pain in the neck or down the upper extremities to support a conclusion that such a condition was severe enough to be problematic. Therefore, the occupational factor was the sole contributor to the problem. . . .
>
> As to the duration of any preexisting disc bulges, because the duration cannot be determined, it cannot be applied as a factor.

Dr. Callaway did, in fact, testify that the hi-lo driving/twisting would cause this kind of pathology and even if plaintiff had some pre-existing conditions, this work activity "would have for sure aggravated" it and the aggravation would have been "significant." Similarly, Dr. Buchman testified, "My opinion is that the work as described in all medical probability significantly aggravated or accelerated the cervical disc disease and necessitated the cervical fusion."

Since this testimony constituted competent evidence to support the conclusion that the work activity significantly contributed to the bulging disc pathology, there is no basis to reverse.

B.

Defendant argues that the MCAC erred in failing to address an issue that it raised on appeal to the MCAC. Specifically, defendant claims that the MCAC should have addressed whether the magistrate's issuance of an open continuing medical benefits award was proper when it issued a closed weekly wage-loss benefit award.

Defendant concedes that the MCAC did not address this issue. In order to preserve an issue for appeal, it must be raised before and *addressed and decided by the lower court*. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Here, defendant arguably raised the issue when it initially appealed the magistrate's original opinion. While arguing that the magistrate failed to properly weigh the non-occupational contributing factors, defendant presented an alternative argument that the medical benefits also should have been closed as of the date the weekly wage loss benefits were closed. In its opinion and order, the MCAC remanded for the magistrate to conduct further findings related to the issue of significant contribution under MCL 418.301(2). However, the MCAC did not address defendant's alternative argument. On remand, the magistrate performed its analysis, and once again, both parties appealed to the MCAC. This time, however, defendant failed to pursue its prior issue regarding whether the award of medical benefits should have been for a closed period as well. Not surprisingly, when the MCAC issued its latest opinion after the remand, it never addressed defendant's issue.

We find that defendant's treatment of this issue has resulted in it being abandoned. While defendant did initially raise the issue before the MCAC, it subsequently abandoned it when it failed to follow up on the issue after the magistrate issued his second opinion after the remand. Defendant was aware of the MCAC's non-treatment of this issue initially and had ample opportunity to raise the issue again in its brief after the remand. We see no reason why this conduct should not be construed as abandonment. In any event, assuming there was no abandonment, we simply decline to address this unpreserved issue. See *Wiggins v City of Burton*, 291 Mich App 532, 574; 805 NW2d 517 (2011) (declining to address an issue that would be addressed for the first time at this Court).

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Colleen A. O'Brien